very strong decisions supporting the other side of the argument. *Hinckley v. Schwarzchild and Sulzberger Co.,* 107 App. Div. 470, a leading N. Y. case holds that acts, which do no more than regulate and control the internal management of a corporation so far as it has relation to the public and concerns the policy of the State, are within the power to alter and repeal, even although the exercise of the power adds to the burden of the stockholder by increasing his liability, diminishing the value of his stock or by changing the name, offices or proportion in control of the corporation. On this ground, the court held valid a decree of the legislature, permitting a domestic stock corporation whose certificate of incorporation did not provide for the issuing of preferred stock, to issue such stock upon obtaining the consent of two-thirds of the stockholders. The issue of such stock concededly changed the character and value of the original stock by subordinating it to the preferred issue. Such laws are permitted on the ground that it was a part of the contract that such acts might be done. *Buffalo & N. Y. City R. R. Co. v. Dudley,* 14 N. Y. 347. The mere production of inequality in shares of stock does not avail to defeat either vested or contract rights. *Smith v. Atchison, T. & S., F. R. Co.,* 64 Fed. 272. A similar decision in Vermont proceeds upon the ground that the issue of preferred stock is a provision, mainly for the object of raising money for the purposes of the corporation. *Rutland & Burlington R. R. Co. v. Thrall,* 35 Vt. 536. In the States following this latter doctrine, the fact that every purchaser of stock in the company has agreed to accept and hold his shares, when he knows of the reservation and of the consequent liability of change, outweighs any consideration of the disturbance of vested rights. That this minority view is, however, disappearing, seems to be evidenced by the dicta of several judges in the cases cited, to the effect that weight of authority rather than principle controlled their decisions.

INNKEEPER—LIABILITY FOR EMPLOYEES' INSULTS TO GUESTS

Does the relation that exists between the keeper of a hotel and his guest make the former liable for any misconduct of his employees by which the guest is injured while in the hotel and in his care? Does an innkeeper owe the same degree of care to his guests that a common carrier does to his passengers? In the recent case of *De Wolf v. Ford,* 104 N. Y. Supp. 876, it was *held, McLaughlin dissenting,* that an innkeeper is not liable on his implied contract to protect his guests from insults by employees for the act of his servant in entering in the night-time the room of a female guest against her protest, and, in the presence of others, using towards her insulting language, and charging her with immoral conduct.

It is conceded that the liability of both carrier and innkeeper for the property of the passenger or guest is that of insurer, but the distinction is not so clear as to their responsibility for the person of the passenger or guest. The general principle that a master is liable for injuries to third persons resulting from the negligence of his servant while in the line of his employment, and is not responsible for the wilful and tortious acts of his servants committed outside

the scope of employment, is nowhere controverted. *Cooley on Torts,* 533 *ff.* Nor do the cases hold that either a carrier or innkeeper is an insurer as to the safety of the person. The question always is whether the servant were acting within the scope of his employment. And here a distinction is made. (a) In the case of the common carrier the logical and necessary result of their relation is that every servant of the carrier, every conductor, brakeman, porter, who is employed to assist in transportation is constantly acting within the scope and course of employment while he is on the train or boat. Any negligent or wilful act of such servant which inflicts injury on the passenger is necessarily a breach of the master's contract of safe carriage for which the latter must respond. *Bass v. Chicago & N. W. R. Co.,* 36 Wis. 450; *Mallach v. Ridley,* 24 Abb. N. C. 172. (b) So, while there are loose statements in the books to the effect that common carriers and innkeepers have a similar liability, the limits, even if we concede this, are not the same. The carrier of persons is bound to exercise the utmost vigilance and care; the innkeeper ordinary care only. And the reason for this distinction seems to be (1) That there is more likelihood of danger to the person from the nature of the carrier's business, and (2) That the passenger necessarily surrenders to the carrier all control and dominion of his person. Therefore, when the servants of the innkeeper are not engaged in the course of employment, though they may be present in the hotel, they are not performing the master's contract and he is not liable for their negligent or wilful acts. *Curtis v. Dinneen,* 4 Dak. 245; *Wade v. Thayer,* 40 Cal. 578; *Weeks v. McNulty,* 101 Tenn. 499; *Sandys v. Florence,* 47 L. J. C. P. N. S. 598.

But it is claimed that recent cases have changed the liability of the innkeeper to that of insurer. The first cases quoted are those of *Rommel v. Schambacher,* 120 Pa. 579, and *Curran v. Olson,* 88 Minn. 307. In each of these a saloon-keeper was held bound to use reasonable care to protect his guests from injury at the hands of lawless persons in the saloon. So in *Mastad v. Swedish Brethren,* 83 Minn. 40, the owner of a picnic-ground was held to the exercise of reasonable care to protect patrons and was liable for failure therefor. In *Dickson v. Waldron,* 135 Ind. 507, the manager of a theater was held liable for the wilful act of one of the servants acting within his employment. In each of these cases the court was clearly correct in holding the innkeeper, saloon-keeper, or manager liable for negligence or carelessness, and not one is put upon the ground, or goes so far as to hold, that an innkeeper is an insurer of the safety of his guest's person. In *Jencks v. Coleman,* 2 Sumn. 221, Story, J., following Shaw, C. J., in *Comm. v. Power,* 7 Met. 601, said: "An owner of a steamboat or railroad in this respect is in a condition somewhat similar to that of an innkeeper whose premises are open to all guests. Yet he is not only empowered but is bound so to regulate his house, as well with regard to the peace and comfort of his guests who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein." But these oft-quoted words fall far short of justi-

fying the conclusion that he is liable as an insurer of the safety of his guest's person. It cannot be denied, however, that the recent case of *Clancy v. Barker,* 71 Neb. 83, does hold an innkeeper liable as an insurer of the person, regardless of whether the servant were acting within the scope of his authority. But upon the same state of facts, in *Clancy v. Barker,* 131 Fed. 161, in another suit, the Circuit Court, per Sanborn, in a well-considered opinion, held the innkeeper not liable for the servant's tortious act where not done in the scope of his employment. Therefore, with the exception of the Court of Nebraska, while the distinctions are not always clearly drawn, it nowhere appears that an innkeeper is held to insure the person of his guest against the acts of his servants when beyond the line of their authority.

POWERS OF THE FEDERAL GOVERNMENT.

No recent decision of the United States Supreme Court has been a source of greater interest than the case of *Kansas v. Colorado,* 206 U. S. 46. Aside from its importance as a controversy between two sovereign states, it is especially noteworthy on account of the claims put forward on the part of the Federal Government.

Kansas brought in the Supreme Court a suit to restrain Colorado from diverting the water of the Arkansas River for the irrigation of lands in Colorado. It was contended that this artificial diversion diminished the natural and customary flow of the river into and through Kansas. Then it was that the United States filed an intervening petition claiming the right to control the waters of the river to aid in the reclamation of arid lands.

The argument of counsel for the government was unique. It was contended that the control of such a stream valuable for irrigation purposes was necessary for the furtherance of the government's policy as to irrigation. This being conceded, the Federal Government would properly have control of such a stream under that provision of the Constitution which gives Congress all the incidental and instrumental powers necessary and proper to carry into execution all the express powers. *Const.,* Art. I, Sec. 8, cl. 18. See *Story on Const.,* Sec. 1243.

This brought up for the consideration of the court the question as to whether the right to reclaim arid lands was one of the powers granted to Congress by the Constitution. No proposition of constitutional law is more thoroughly settled than that the Federal Government is a government of delegated powers. *Martin v. Hunter's Lessee,* 1 Wheat. 304; *Gibbons v. Ogden,* 9 Wheat. 1; *McCulloch v. Md.,* 9 Wheat. 316. And the right to legislate for the reclamation of arid lands, aside from those the ownership of which is vested in the Federal Government, is not one of the powers expressly delegated to Congress.

Unable to rely upon this point counsel for the government next endeavored to sustain the right of Congress to legislate for an interstate stream, which is not navigable, by "the doctrine of sovereign and inherent power." Their argument was in substance: All legislative power must be vested in either the state or the National